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IN THE COURT OF APPEALS OF IOWA
CLERK SUPREME COURT

IN RE THE MARRIAGE OF RUSSELL JAMES MALAND AND SUSAN ELAINE MALAND

Upon the Petition of	)	
RUSSELL JAMES MALAND,	)	
Petitioner-Appellant,	)	Filed March 24, 1981
And Concerning	)	
SUSAN ELAINE MALAND,	)	
Respondent-Appellee,	)	<u>0-461</u> <u>2-65227</u>

Appeal from Hamilton District Court-David R. Hansen, Judge.

Petitioner appeals from economic provisions of the parties' dissolution decree, contending 1) that the property division and alimony award were inequitable, 2) that there was insufficient evidence to support a finding that the respondent had a reduced life expectancy, and 3) that the trial court erred in considering a separation agreement alleged to be unsupported by adequate consideration. **AFFIRMED.**

Keith Van Doren of Hemingway, Myers & Bottorff, Webster City, for petitioner-appellant.

Paul Moser, Jr., Des Moines, for respondent-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Petitioner Russell Maland appeals from economic provisions of the parties' dissolution decree, asserting that both the property division and the alimony award were inequitable. Petitioner also asserts that the trial court erroneously considered a separation agreement allegedly unsupported by adequate consideration and that the evidence was insufficient to support a finding that the respondent Susan Maland had a reduced life expectancy. We affirm.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. Our responsibility is to review the facts as well as the law and to determine rights anew from the credible evidence on properly presented and preserved issues. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). While we give weight to the findings of the trial court, especially where the credibility of witnesses is involved, we are not bound by them. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); Iowa R. App. P. 14(f)(7). As in all cases of this type, precedent is of little value and our decision must ultimately depend on the particular facts of this case. In re Marriage of Kehrl, 241 N.W.2d 923, 926 (Iowa 1976).

I.

Petitioner and respondent were married on November 24, 1972. At that time petitioner was twenty-five and employed at the 3M plant in Ames, Iowa; respondent was twenty-one and employed as a keypunch operator at Iowa State University in Ames. When the dissolution decree was entered on May 27, 1980, petitioner was thirty-three and earning a gross weekly salary of \$350 as a production supervisor over approximately thirty people; respondent was twenty-nine, permanently unemployed due to cystic fibrosis, and receiving social security benefits of \$379 per month. Respondent has had cystic fibrosis since birth. Petitioner was aware of both the existence and the extent of respondent's disease when the parties were married. They had no children.

The decree awarded to the respondent household furnishings valued at \$2,500, a \$1,000 savings account, a 1974 Ford, her medical equipment, and personal property. Respondent was also awarded alimony of \$175 per month and the absolute right to reside in the parties' home rent free so long as she remains unmarried and occupies the house as a personal residence. She was ordered to pay various debts amounting to approximately \$2,000. Petitioner was awarded a 1970 El Camino, automotive tools valued at \$1,500, and all other personal property in his possession. He was ordered to

pay various debts amounting to nearly \$6,700, as well as the mortgage payments, real estate taxes, and insurance premiums on the house that remains titled in the names of the parties as joint tenants with full rights of survivorship. The decree was subsequently modified to award the petitioner a \$1,550 federal tax refund and the respondent a \$228 state tax refund.

When the parties separated in the summer of 1978, they executed a document entitled "legal agreement of settlement," which provided that the petitioner was to pay the following: \$450 per month to the respondent for her support; a \$230 per month house payment; real estate taxes of \$33 per month; and auto and house insurance payments of \$23 per month. The respondent was to retain use of the house and furniture and agreed to postpone filing for divorce. The petitioner subsequently filed his petition for dissolution of the marriage on July 20, 1979. The trial court noted the existence of the agreement, but gave no indication of the extent, if any, it was given effect.

At trial, the respondent testified over hearsay objection that doctors had told her that cystic fibrosis patients have an average life span of twenty-two, but that certain procedures could lengthen that time. The petitioner testified that persons afflicted with cystic fibrosis generally do not expect to live as long as persons not afflicted with the disease and that the respondent's brother had died of the same disease at age twenty-six. The trial court found that at age twenty-nine respondent had already lived longer than the average cystic fibrosis patient and that her overall condition was not improving.

II.

Our analysis of the petitioner's assertion that the property division and the alimony award were inequitable begins with section 598.21, The Code 1979, which provides that "[w]hen a dissolution of marriage is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties as shall be justified." Id. A justified property division is one that is equitable under the circumstances. In re Marriage of Cooper, 225 N.W.2d 915, 919 (Iowa 1975); Bowman v. Bowman, 259 Iowa 820, 822, 146 N.W.2d 333, 334 (1966). The factors to be considered in achieving a fair and equitable determination of the property rights and financial obligations of the parties are set forth in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968) (modified to exclude fault, In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa

1972)). Applying the Schantz criteria to the record in this case, we conclude that the trial court arrived at a fair and equitable determination of the parties' property rights and financial obligations.

The supreme court has recognized that it may be equitable to grant a lifetime interest in the homestead to a wife with a disabling medical condition. See Zinger v. Zinger, 243 N.W.2d 639, 641-42 (Iowa 1976); In re Marriage of Kunzman, 239 N.W.2d 582, 583-84 (Iowa 1976). Therefore, respondent's disabling cystic fibrosis was a factor to be considered by the trial court. Cf. In re Marriage of Schlenker, 300 N.W.2d 164, 166 (Iowa 1981) (wife's kidney disorder considered as factor relevant to size of alimony award). See also Schantz, 163 N.W.2d at 405. While it is true that this marriage was of considerably shorter duration than the marriages in Kunzman and Zinger, allowing the respondent to reside in the parties' house rent free so long as she remains unmarried seems equitable for several reasons. Prior to the marriage, both parties were aware that respondent was afflicted with a potentially devastating and increasingly severe illness which would ultimately shorten her life expectancy. During the course of their marriage, the parties purchased a house and adapted it to the respondent's special health needs by installing special equipment, including a power humidifier and an electrostatic air cleaner. The combination of the parties' prior knowledge of respondent's disease coupled with their attempts to accommodate their home and married life to her illness make her continued residence in the house more equitable than selling the house.

Petitioner argues that the marriage was too short to justify an award of alimony and cites Behrle v. Behrle, 228 N.W.2d 25 (Iowa 1975). Behrle is distinguishable in that at the end of an eleven and one-half month marriage both parties were healthy and able to be employed. In the instant case, while petitioner still is in good health and is able to work, respondent is permanently disabled and must devote considerable amounts of time and money to medical treatments. If no alimony is allowed, respondent's only income would be \$379 per month from social security. From this meager amount, respondent would have to pay her medical expenses (which amount to over \$500 per month) as well as other normal expenses such as food, clothing, utilities, and transportation costs. It thus appears that the trial court's property settlement and award of alimony are equitable when the present standards of living of both parties and the ability of the petitioner to pay are balanced against the respondent's relative needs.

III.

Petitioner argues that the trial court erred in basing its conclusion concerning respondent's reduced life expectancy solely on allegedly incompetent and inadmissible evidence and in basing the economic provisions of the decree on the same objectionable evidence. Petitioner contends that it was error to admit respondent's testimony that "the average life expectancy of cystic fibrosis patients is 22 years." However, substantially the same evidence was entered into the record when petitioner testified without objection that "persons afflicted with cystic fibrosis generally do not expect to live as long as persons not afflicted with the disease." Therefore, if admission of respondent's statement was error, it was not prejudicial to petitioner. Linge v. Iowa State Highway Commission, 260 Iowa 1226, 1236, 150 N.W.2d 642, 648 (1967). Moreover, since respondent's life expectancy was only one of the factors considered by the court in fashioning its decree, we think it is an overstatement to assert that the economic provisions of the decree were based on testimony concerning life expectancy.

Petitioner's argument that standard life expectancy tables would be the best evidence of respondent's life expectancy is also without merit. Petitioner cites Tandy v. Knox, 313 Mich. 147, 20 N.W.2d 844 (Mich. 1945) as authority for the use of standard life expectancy tables; however, there was no evidence in Tandy to show that the person whose life span was estimated suffered from any adverse medical condition. Where there is evidence of the person's precise condition of health and of how that condition might affect chances for longevity, the use of standard life expectancy tables does not seem justified.

IV.

Petitioner also contends that the trial court treated the parties' temporary separation agreement as a contract and gave the agreement legal effect when it was unsupported by consideration. We are not persuaded by this contention. The trial court does mention the existence of the agreement and reproduces some of its terms in the findings of fact, but the terms of the decree itself are not identical to the terms of the separation agreement. For example, the decree reduces the support payment from \$450 to \$175, eliminates the requirement that petitioner pay respondent's auto insurance, and changes the manner in which any future proceeds from the sale of the house will be divided. In light of these changes, it does not appear that the trial court enforced the separation agreement as a contract.

For the foregoing reasons, we affirm the trial court's decree.

AFFIRMED.